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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1058

H. M. HARRINGTON, JR.,
Petitioner,

v.

TEXACO INC.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

Respondent does not accept Petitioner's Statement of the Case or his Statement of the Facts because they are argumentative rather than factual. This case is correctly stated in the opinion of the Honorable United States Court of Appeals for the Fifth Circuit, 339 F. 2d 814 (R. 470-482). Additional details may be found in the Pre-Trial Order (R. 36-43). Contrary to Petitioner's opening statements, the Trial Court and the Court of Appeals have correctly applied existing Texas law to the facts established or admitted in the trial.

THE QUESTION PRESENTED

Respondent cannot agree that the question presented is as stated by Petitioner because it ignores the usual and accepted meaning of the term "operator" and disregards

the clear and unmistakable use of the term in the statutes of the State of Texas and in the rules and regulations of the Texas Railroad Commission. There is no question as to the meaning or significance of the term "operator" in this case.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

1. No grounds for review are shown by Petitioner.

2. The Trial Court and the Court of Appeals correctly held that as the designated "operator" of the slanted well Petitioner is jointly and severally liable.

3. The Trial Court and the Court of Appeals correctly held that Petitioner's liability is not limited to his personal receipts.

ARGUMENT

I. No grounds for review are shown by Petitioner.

There does not exist a single "special" or "important" reason for the granting of this Writ, and Petitioner has wholly failed to bring his Petition within the requirements of Rule 19 of this Honorable Court. This case is controlled solely by principles of local law. No Federal question is involved. The questions involved are neither of general nor public importance. The decision is not in conflict with applicable state law or "important state or territorial questions." Only "real and embarrassing conflicts of opinions and authority" justify intervention by Writ of Certiorari. *N.L.R.B.* v. *Pittsburgh SS Co.*, 340 U.S. 498, 95 L. Ed. 479; *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 99 L. Ed. 897; *Layne & Bowler Corporation* v. *Western Well Works*, 261 U.S. 387, 67 L. Ed. 712.

II. The Trial Court and the Court of Appeals correctly held that as the designated "operator" of the slanted well Petitioner is jointly and severally liable.

It is inconceivable that a person as experienced and knowledgeable as Petitioner, both in actual oil and gas operations and in oil and gas law, would seriously make the contentions found in the Petition filed here.

The Texas Revised Civil Statutes, the Texas Penal Code, 42 and 43 Tex. Jur. 2d, *Oil and Gas,* the Rules and Regulations of the Texas Railroad Commission, legal treatises and texts, and the decisions of the appellate courts of the State of Texas are replete with references to oil and gas "operators." In Article 6025, Texas Revised Civil Statutes, and in Texas Railroad Commission Rule 32 (set out in Appendix A to this brief) the meaning of the words "operating" and "operator" is clear and definite. The term "operator" is rarely defined because it is a word of such common usage that no definition is required. One of the few instances of definition appears in the Rules and Regulations of the Texas Railroad Commission (R. W. Byram & Co.), Section 1, Page 2, which says:

> "Operator means a person, acting for himself or as an agent for others and designated to the Commission as the one who has the primary responsibility for complying with its rules and regulations in any and all acts subject to the jurisdiction of the Commission."

Another rare instance of definition is found in Williams and Meyers, *Manual of Oil and Gas Terms,* annotated, Page 171:

> "Operator — a person, natural or artificial (e.g. corporate) engaged in the business of drilling wells for oil and gas."

58 C.J.S., *Mines and Minerals*, Section 3, Page 51, defines "operator" as follows:

> "*Operator.* The person, firm, or corporation actively and directly engaged in operating a mine."

Chapter 21 of Summers', *The Law of Oil and Gas*, is entitled "Liability of Oil and Gas Operator to Lessor and Third Persons." Throughout the chapter, which extends from Section 651 through Section 662, both inclusive, the terms "operator," "producer," and "lessee" are used interchangeably.

It is not unusual for Petitioner to refer to himself as an "operator" or to be referred to as an "operator," for he is the same H. M. Harrington, Jr., referred to by the Supreme Court of Texas in the recent case of *Harrington* v. *Railroad Commission*, 375 S.W. 2d 892 (1964), as follows:

> "Harrington is one of the oil *operators* caught up in the East Texas slant-hole dragnet." (Emphasis added)

The Supreme Court of Texas did not find it necessary to define its use of the term "operator."

When Petitioner Harrington filed the report known as Texas Railroad Commission Form 7 (as required by Article 6035, Texas Revised Civil Statutes, and by Texas Railroad Commission Rule 32) identifying himself to the Railroad Commission as the operator of the oil well in question (R. 40), he did so as:

> "Any person . . . operating . . . within this state, acting as principal or agent . . . for the purpose of . . . operating any oil or gas well . . ."

When Petitioner, as an attorney of record for himself and the other defendants in the case, entered into that portion

of the fact stipulation (see Appendix B to this brief) made a part of the Pre-Trial Order (R. 36-49), which recited:

> "Thereafter H. M. Harrington, Jr. was designated operator of the well from that date until the well was shut-in during July of 1962."

he well understood the meaning of the term "operator."

As previously stated, there just simply is no question as to the meaning or significance of the word "operator" as used in this case; and there is, likewise, no question that Petitioner was the principal tort-feasor in this case. He was, at all times, the owner of a full one-third (⅓) of the working interest or leasehold estate. He was one of the three original lessees (R. 39). He authorized the drilling and completing of the slanted well, and he paid part of the costs thereof (R. 316). He was the "H" in H A L Company, the assumed name used for the original operation of the lease (R. 39). Use of the assumed name was abandoned; and on July 30, 1953, he was named as the sole operator of the well (R. 40). He remained the operator throughout its remaining productive period until it was shut-in in July of 1962. As the operator of the oil and gas lease or well in question, he was the person in charge of the physical operations of the lease, including drilling and reworking wells, and producing and delivering oil and gas to the pipelines. He was the person selected by the owners of the working interest to operate this property. As such operator, and as a working interest owner, for himself and for the other working interest owners, he had the duty to operate and maintain the lease and to market the oil and gas produced on such lease. See *Wolfe* v. *Texas Company*, 83 F. 2d 425 (10th Cir., 1936). Petitioner, as the operator of the well during the two years immediately preceding the filing of the lawsuit, is the person who took physical possession

of Respondent's oil and gas and converted it. As the operator he was the person directly responsible for the taking of the oil and gas. In other words, he was the initial convertor of the oil and gas. As the Court of Appeals said:

> "It is entirely reasonable to subject a designated operator having such immediate practical operational command over day-to-day production activities of the well to an accountability for an unlawful conversion of all of the oil." (R. 476)

The essence of conversion of property is the wrongful deprivation of it to the owner. Conversion may be direct or constructive. *Sandor Petr. Corp.* v. *Williams*, 321 S.W. 2d 614 (Tex. CCA, reh. den., err. ref., n.r.e.). A constructive conversion takes place when a person does such acts in reference to the goods or personal chattels of another as amount, in view of the law, to the appropriation of the property to himself. A direct conversion takes place when a person actually appropriates the property of another to his own beneficial use and enjoyment, or to that of a third person, or destroys it, or alters its nature. *Stidham* v. *Lewis*, 23 S.W. 2d 851 (Tex. CCA). It matters not that Petitioner may have shared the proceeds from the sale of the oil and gas with others, for any reason, as agent or otherwise; he is still primarily liable to Respondent for the full amount of Respondent's damages. 14 Tex. Jur. 2d, *Conversion*, Section 52, pp. 51-52. While the injured party whose property has been converted may recover his property from anyone who may have received any part of it, he is not required to do so. He may elect to sue the person guilty of the conversion initially. One who has converted property cannot escape liability to the owner by showing that he acted as agent, since his responsibility is not determined by what he may realize from the transaction. *Shilling* v. *Shilling*, 35 S.W. 420 (Tex. CCA); 14 Tex. Jur. 2d, *Conversion*, Section 45,

pp. 48-49. The only intent required in conversion is the intent to assert some right to the property, *Terry* v. *Witherspoon*, 255 S.W. 471 (ex. CCA, 1923), affirmed 267 S.W. 973 (Tex. CCA, 1925); *Gulf, C. & S. F. R. Co.* v. *Pratt*, 183 S.W. 103 (Tex. CCA, 1916) (refused), accompanied by some positive act in conversion, *Gulf, C. & S. F. R. Co.* v. *Pratt*, *supra*, which in this case could be either the taking of the oil from the ground or the sale of the oil after it is reduced to possession as personalty.

Liability in trover rests on a person who has, without right, received the direct benefits of the personal property of another, or on one who has aided or abetted another in keeping property from the rightful owner. *Moore* v. *Barlow*, 352 S.W. 2d 804 (Tex. CCA, reh. den., err. ref., n.r.e.). Thus, all persons who acted in effecting the conversion may be held jointly or severally liable. *Word* v. *Odem*, 153 S.W. 634 (Tex. CCA, no writ hist.); *Adams* v. *Whatley*, 213 S.W. 2d 885 (Tex. CCA, no writ hist.).

It is evident from the foregoing that Petitioner, because of his position as a working interest owner of the slanted well, and especially as the *operator* of the well, was jointly and severally liable for the total amount of Respondent's recovery, as a matter of law, without regard to any fact-finding by the jury, as to "willfulness," "wrongful-intent," or "knowledge."

III. The Trial Court and the Court of Appeals correctly held that the Petitioner's liability is not limited to his personal receipts.

Petitioner contends, as he did in the Courts below, that he is not subject to joint liability for the further reason that the injury to Texaco was a divisible injury so that his liability is, therefore, limited to his personal receipts from

the sale of the converted oil and gas. Alternatively, he says that if he is jointly liable, then he is individually entitled to full credit against the judgment rendered against him for all moneys received by Texaco from Texas Pacific Coal and Oil Company. As is indicated in the Agreed and Admitted Fact Section of the Pre-Trial Order (R. 5643) and in the opinion of the Court of Appeals, Respondent had executed a Covenant Not to Sue Texas Pacific Coal and Oil Company (hereinafter called Texas Pacific). Texas Pacific owned the mineral fee underlying land adjoining Respondent's 200-acre Snider lease along its east boundary line. In 1952, Texas Pacific leased a 20-acre tract to Petitioner Harrington, and his associates, Allgood and Lutes (R. 39), retaining a one-fourth (¼) royalty. As a lessor and royalty owner, Texas Pacific did not participate with Petitioner and his associates in the drilling and operating of the slanted well. It did, however, receive a share of the proceeds derived from the sale of the oil and gas (R. 40), after the oil and gas had been severed from the land by the operator (Petitioner). It was, therefore, guilty of conversion of personal property. *W. B. Johnson Drilling Company* v. *Lacy*, 336 S.W. 2d 230 (Tex. CCA, no writ hist.). *Pan American Petroleum Corporation* v. *Long*, 340 F. 2d 211 (5th Cir., 1964). At the time of the execution of the Covenant Not to Sue, in 1962, Respondent had claims against Texas Pacific for money it had received as royalty from the production and sale of oil and gas from two wells, Petitioner's well and the Earl Sharp-Texas Pacific Coal and Oil Company No. 1 (R. 41). With regard to Petitioner's well, Respondent's claim against Texas Pacific was for the amount it had received as royalty for a period of *ten years*, or approximately $167,000. *The Covenant Not to Sue covered the full 10-year claim against Texas Pacific.* Respondent had not joined Texas Pacific as a party defendant in this suit;

it was not required to do so. Texas Pacific was not a necessary party.

In *Lawrence* v. *Sun Oil Company*, 166 F. 2d 466, 469 (5th Cir., 1948), the Court said:

> ". . . in numerous adjudications it has been held that the test of indispensability is whether the absent party's interest in the subject matter of the litigation is such that no decree can be entered in the case which will do justice between the parties actually before the court without injuriously affecting the rights of the absent party."

See also *Chance* v. *Buxton*, 170 F. 2d 187 (5th Cir., 1948).

If Petitioner and his associates had a right of indemnity or contribution against their lessor, Texas Pacific, they were free to file a third party action, or a separate suit in the State Court. In *Riley* v. *Industrial Finance Service Company*, 157 Tex. 306, 302 S.W. 2d 652, the Supreme Court of Texas said:

> "The wronged person as plaintiff may sue one or more of the tort-feasors. If less than all tort-feasors are joined as defendants by plaintiff, then those joined may bring in the others."

In a very recent decision, *Palestine Contractors, Inc.* v. *Perkins*, 386 S.W. 2d 764, the Supreme Court of Texas again said:

> "It is undisputed that a plaintiff may sue one of several joint tort-feasors and collect the full damages from him. Landers v. East Texas Salt Water Disposal Company, 151 Tex. 251, 248 S.W. 2d 731 (1952). It is also undisputed that had Perkins sued Palestine Contractors without agreeing not to sue Conoway, Palestine Contractors would have had to pay the total damages. It could in turn sue Conoway for contribution either in the same or in a subsequent suit."

Respondent had a right to settle separately with Texas Pacific and to do so without jeopardizing its claim, or causes of action, against Petitioner, or any of the tort-feasors involved. The policy of the law is to encourage settlements and thus avoid litigation. If Petitioner's reasoning was pursued to a logical conclusion, it would mean that if Texas Pacific had paid Respondent the full amount of its receipts for the entire 10-year period (approximately $167,000), then Respondent could have recovered nothing against Petitioner. Surely, this cannot be the law.

As recited in the Pre-Trial Order, the Covenant Not to Sue, executed by Respondent and Texas Pacific, expressly provided that it was not in any wise to affect or relate to, nor in any way to release or discharge, any claim, demand, or cause of action which Respondent Texaco had, or may have had, against Petitioner Harrington, or his associates, Allgood, Lutes, Baton, and Godfrey, arising out of, or resulting from the drilling or operating of Petitioner's well. This Covenant Not to Sue was executed on October 23, 1962, at a time when Respondent Texaco was actively pressing its claim against Petitioner for the full amount of its damages for the entire 10-year period. It was not until some six months later, in the Pre-Trial Order, dated May 9, 1963, that Respondent agreed to limit its claim against Petitioner to the value of the oil and gas produced during the two-year period immediately preceding the filing of this lawsuit.

Respondent's damages, at the time the Covenant Not to Sue was executed, at the time the Pre-Trial Order was entered, *and now*, are equal to the value of its interest in the oil and gas produced through Petitioner's slanted well during its full 10-year productive period. If judgment for the full amount of Respondent's damages (approximately $586,000) had been entered against Petitioner, then Peti-

tioner would have been entitled to full credit for the amount received in settlement from Texas Pacific ($23,109.59). *Bradshaw* v. *Baylor University*, 84 S.W. 2d 703 (Tex. CCA, 1935). Under the recent decision of the Texas Supreme Court, *Palestine Contractors, Inc.* v. *Perkins, supra*, Respondent's recovery of its total damages ($586,000) could have been reduced by no more than one-fourth (¼) as a result of having entered into the Covenant Not to Sue Texas Pacific. *However, Respondent's recovery was $500,000 short of the full amount of its damages.* The fact that a portion of Respondent's "recovery" of its total damages may be barred by the statutes of limitation does not change the fact that such damages were suffered.

For the Court to permit Petitioner to have benefits from Respondent's settlement with Texas Pacific, to the extent to which he claims to be entitled, would be in gross violation of sound equitable principles.

As is stated in Pomeroy's Equity Jurisprudence, 5th Edition, Section 385:

> "The meaning is, that whatever be the nature of the controversy between two definite parties, and whatever be the nature of the remedy demanded, the court will not confer its equitable relief upon the party seeking its interposition and aid, unless he has acknowledged and conceded, or will admit and provide for, all the equitable rights, claims, and demands justly belonging to the adversary party, and growing out of or necessarily involved in the subject matter of the controversy."

See also *Marathon Oil Company* v. *Gulf Oil Corporation*, 130 S.W. 2d 365 (Tex. CCA, 1939), modified 137 Tex. 59, 152 S.W. 2d 711.

In the Trial Court, as a partial bar to Respondent's recovery, Petitioner could have urged the Texas two-year

statute of limitation, as he did, or he could have claimed the full benefit of the settlement with Texas Pacific, but he was not entitled to do both.

Since by stipulation Respondent's recovery was limited to the value of its oil and gas produced in the two-year period immediately preceding the filing of this lawsuit, it is Respondent's firm conviction that Petitioner should not have received credit for any of the money paid to Respondent by Texas Pacific. However, the Trial Court saw fit to allocate the amount of Respondent's receipts from Texas Pacific over the full 10-year period, and thereby gave Petitioner credit for the amount allocated to the last two years, or $4,020 (R. 51). Certainly Petitioner, who personally received more than $167,000 from the wrongful conversion of Respondent's oil, should not be heard to complain about the equitable action of the Trial Court.

Respondent submits that the Texas cases pertaining to divisible injuries resulting from the separate acts of two or more tort-feasors and to rights of contribution among joint tort-feasors are not applicable to this case because, as previously stated, Petitioner, as the operator of the slanted well, was more than a *joint* tort-feasor. He was the *principal* tort-feasor. Petitioner cites, with approval, the decision of the Court of Appeals in *Pan American Petroleum Corporation* v. *Long*, *supra*, and indicates that the Court of Appeals for the Fifth Circuit has been inconsistent in its treatment of these two slant-hole cases (submitted on brief and oral argument to the same panel on the same day). However, it should be noted that in the *Long* case the Trial Court entered judgment against Operator Long for the market value of seven-eighths (⅞) of the oil produced over the entire 13-year period of operation, against the other lease interest owners for the amounts they actually received during the same period, and against Southwestern Life Insur-

ance Company for amounts received by it during the last two years. In that case, the guilty operator did not appeal. Petitioner overlooks this pertinent point and seeks to place himself in a position similar to that occupied by Southwestern Life Insurance Company. A portion of the opinion of Judge Garza in *Pan American Petroleum Corporation* v. *Long, supra,* (concurring in part and dissenting in part) is of interest:

> "In Harrington v. Texaco Inc., 339 F. 2d 814, I concurred in that part of the opinion making Harrington responsible for all of the money received from the sale of oil from the slanted oil well because Harrington was the designated operator and as such he was charged with duties and responsibilities that are not present in the case of Southwestern Life."

Actually, in this case in the Trial Court, Petitioner occupied the same position occupied by H. L. Long in *Pan American Petroleum Corporation* v. *Long, supra.* Had Texas Pacific been a party in this case in the Trial Court, its position would have been similar to that of Southwestern Life Insurance Company in the *Long* case.

For the foregoing reasons, it is apparent that the arguments advanced by Petitioner for limiting his liability to his personal receipts are invalid; and that, therefore, the Courts below correctly held him to be jointly and severally liable.

CONCLUSION

The Petition for Writ of Certiorari presents the strange spectacle of an experienced oil and gas operator, who operated a slanted well which produced more than $670,000 worth of oil and gas from under Respondent's property, complaining of a joint and several judgment against him for less than $72,000 because he says there was no proof of an "act" of conversion on his part. No basis of review exists. Moreover, two Courts, experienced and eminently qualified in Texas law, have already carefully considered and rejected each of Petitioner's contentions. It is submitted that their judgments are right and that the Writ sought should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply to Petition for Writ of Certiorari were served upon H. M. Harrington, Jr., Petitioner, 324 Bramlette Building, Longview, Texas, on this 26 day of April, 1965, by depositing the same in the United States post office or a mail box with first class postage prepaid, addressed to said Petitioner at his post office address.

William Alan Mudgett

William Alan Mudgett

APPENDIX A

For the convenience of the Court, the Texas Revised Civil Statutes, Article 6035, and Texas Railroad Commission Rule 32 (referred in the opinion of the Court of Appeals) are set out below:

"Article 6035. Report to Commission.

"*Any person*, firm, partnership, joint stock association, corporation or other organization, domestic or foreign, *operating* wholly or partially *within this State*, *acting as principal or agent* for another, *for the purpose of* drilling, owning, or *operating any oil or gas well*, or owning or controlling leases of oil and mineral rights or the transportation of oil or gas by pipe line, *shall immediately file with the Commission the name of the company or organization*, giving the name and post-office address of the organization, the plan under which it was organized, and the names and post-office addresses of the trustee or trustees thereof, and the names and post-office addresses of the officers and directors. Id." (Emphasis added)

"Rule 32. Books to be Kept — Reports to be Made.

"*All* owners and *operators of oil and gas wells* in this State *shall keep books showing accurately the* amount of stock sold and unsold and amount of promotion money paid, *amount of oil and gas produced and disposed of, with the price for which the same was sold*, together with the receipts from the sale or transfer of leases or other property, and the disbursements made in connection with or for the benefit of such business; which books shall be kept open for the inspection of the Railroad Commission of Texas or any accredited representative thereof, and of any stockholder or shareholder or royalty owner in said business; and shall report such information, when required by the Commission to do so. *Any person*, firm, partnership, joint stock association, corporation, or other organization, domestic or foreign, *operating* wholly or partially *within this State, acting as principal or agent* for another, *for the purpose of* drilling, owning or *operating*

any oil or gas well, or owning or controlling leases of oil and mineral rights, or the transportation of oil and gas by pipelines, *shall immediately file with the Railroad Commission of Texas at Austin, the name of the company or organization,* giving the name and post-office address of the organization, the plan under which it was organized, and the names and post-office addresses of the Trustees thereof, and the names and post-office addresses of the officers and directors." (Emphasis added)

APPENDIX B

In addition, a portion of the Pre-Trial Order (R. 39-40) pertinent to the argument, is set out:

"Such above described 20-acre tract, was, in 1952, leased by the mineral owner, Texas Pacific Coal and Oil Company to H. M. Harrington, Jr., Reid H. Allgood, and Charles W. Lutes, for oil and gas development. The leasehold estate, or working interest ownership of this oil and gas lease, at all times material to this lawsuit, was, and is, owned by the following persons: H. M. Harrington, Jr. — one-third (1/3); Charles W. Lutes — one-third (1/3); Reid H. Allgood — one-sixth (1/6); J. W. Baton—one-twelfth (1/12); and Douglas Godfrey — one-twelfth (1/12). The HAL Company-Texas Pacifice Coal and Oil Company Well No. 1 (also known as the H. M. Harrington, Jr., et al-Texas Pacific Coal and Oil Company Well No. 1) whose surface location is on such tract, was drilled in the month of April, 1952. The name 'HAL Company' was originated as a designation of the operation for this particular well, taken from the first letter of the last names of the first above mentioned working interest owners. The Railroad Commission of Texas Form 7 designation of the operator of the well was filed by J. W. Baton, operating under the trade name of 'HAL Company.' The well was operated under this name from that date of the drilling of the well until July 30, 1953. Thereafter, H. M. Harrington, Jr., was designated operator of the well from that time until the well was shut-in during July of 1962."